Supreme Court, U.S.
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No. 96-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DOUGLAS RAY HICKMAN, in propria persona
Petitioner,
vs.
COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, and DOMINICK J. RIVETTI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment to the Constitution confers upon individual citizens standing to enforce a personal right to keep and bear arms.

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals were Douglas Ray Hickman and the following: the County of Los Angeles, Sherman Block, Patrick G. Leonard, Claude Farris, Ed Barston, the City of Los Angeles, Robert M. Talcott, Herbert F. Boekmann, Rev. A. B. Tooley, Samuel L. Williams, Stephen D. Yslas, Frank E. Peirsol, the City of San Fernando, and Dominick J. Rivetti.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Hickman v. Block, et al.*, 81 F.3d 98 (9th Cir. 1996) and is reproduced in the Appendix ("App.") at "2a". The opinion of the United States District Court was not reported.

JURISDICTION

On April 5, 1996, the Court of Appeals affirmed the judgment of the District Court, ruling that petitioner Hickman had no standing to sue as an individual under the Second Amendment. Having not sued to defend the "state's right to keep an armed militia," he had failed to show "injury" as required by the constitutional doctrine of standing. Therefore, the Court of Appeals reasoned, because the Second Amendment is a right held only by the states, and not by individual citizens, an individual citizen like Hickman could show no legal injury. On May 6, 1996, the Court of Appeals denied Hickman's right to file a petition for rehearing, and his suggestion for rehearing en banc, on the grounds that the requisite papers were filed one day late. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not infringed. U.S. Const., Amend. II.

42 U.S.C. Section 1983 (Reproduced in the Appendix.)

Cal. Penal Code Section 12050(a)(1) (Reproduced in the Appendix.)

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner Douglas Ray Hickman is a citizen of the United States who sought from the respondents, on various occasions, a permit to carry a concealed firearm pursuant to California Penal Code Section 12050(a)(1). Each request for a permit was rejected. Hickman then filed suit for damages and injunctive relief. His claim for relief under 42

U.S.C. Section 1983, based on a violation of the Second Amendment, was dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6). Eventually the remaining claims were rejected by the District Court. After summary judgment was granted for the remaining parties, County of Los Angeles, City of San Fernando, and their respective named officials, Hickman appealed the granting of summary judgment to the Court of Appeals. Federal jurisdiction in the Court of Appeals was based on 28 U.S.C. Section 1291.

On appeal, the Ninth Circuit panel isolated Petitioner's Second Amendment claim and issued a published opinion on that claim alone; all other claims were denied in an unpublished memorandum opinion. Specifically, the Court of Appeals affirmed the judgment of the District Court on the basis that it had no jurisdiction to hear the appeal.

The Court of Appeals based its finding that Hickman had no standing on the belief that "the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen." *Hickman*, 81 F.3d at 101. The Court of Appeal thereafter denied Hickman's petition for rehearing and suggestion for rehearing en banc on the grounds the attempted filing of the petition was one day late.

(ii) Facts

Hickman applied to the respondents for a concealed firearms permit under the authority of a California statute which provides, in relevant part:

> The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to that person a license to carry a pistol, revolver or other firearm capable of being concealed upon the person . . . .

Cal. Penal Code Section 12050(a)(1).

None of Hickman's various permit applications was approved by the respondents. Hickman then filed suit against the respondents, alleging, *inter alia*, a violation of a right guaranteed by the Second Amendment.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO CORRECT THE ERRONEOUS FINDING OF THE COURT OF APPEALS THAT THE SECOND AMENDMENT DOES NOT GUARANTEE THE INDIVIDUAL CITIZEN'S RIGHT TO KEEP AND BEAR ARMS SUCH THAT THE SECOND AMENDMENT DOES NOT CONFER UPON INDIVIDUAL CITIZENS STANDING TO ENFORCE THE RIGHT TO KEEP AND BEAR ARMS.

I.

INTRODUCTION

The Ninth Circuit expressly stated, "the Second Amendment is a right[1] held by the states, and does not protect the possession of a weapon by a private citizen."[2] This bald pronouncement is in direct conflict with the words of the Second Amendment, and it ignores this Court's interpretations of the scope and meaning of the Second Amendment. It is also completely at odds with the fundamental concepts of jurisprudence that the Constitution and Bill of Rights declare, protect and guarantee the "rights" of individuals while granting and defining limited "powers" to the national government and declaring those "powers" retained by the states and the people.

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[1] Of course, the Second Amendment itself is not a "right." Rather, it guarantees a right.

[2] See discussion in text, *infra*.

Equally disturbing, the Ninth Circuit's brief summary of this Court's decision in *U.S. v. Miller*, 307 U.S. 174 (1939), set forth in its opinion, was glaringly wrong, leading one to wonder whether the Court had actually engaged in any meaningful analysis of the case it relied upon as the "seminal authority in this area." *Hickman*, 81 F.3d at 101. Curiously, while the Ninth Circuit stated on April 5, 1996 in its *Hickman* opinion that "[w]e . . . hold[ ] that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen . . .", *id.*, six days later, in *U.S. v. Gomez*, 81 F.3d 846 (9th Cir. 1996), it stated, "The Second Amendment embodies the right to defend *oneself* and *one's* home against physical attack." *Gomez* 81 F.3d at 850, n.7. [emphasis added by Petitioner]. Unless the Court in *Gomez* meant states live in homes, one must assume that by "oneself" and "one's," it was referring to individuals.

Petitioner does not ask this Court to make any determination with respect to a right of individuals to carry concealed firearms, nor to decide whether the Second Amendment protections apply to the states through the Doctrine of Selective Incorporation.

II

THE NINTH CIRCUIT'S RULING CONFLICTS WITH THE PLAIN TEXT OF THE SECOND AMENDMENT, WHICH CLEARLY GUARANTEES AN INDIVIDUAL RIGHT

The panel's opinion cannot be squared with the text of the Second Amendment. The Amendment does not read: "right of the states." Rather, it reads: "right of the *people* to keep and bear arms. . . ."

The Constitution confers "powers" upon states, not "rights." [3] It therefore follows that the Ninth and Tenth Amendments (which were enacted as one document with the Second), differentiate "rights" of the people, from "powers" of the states.

It is equally difficult to square the panel's opinion with this Court's recent decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Referring expressly to the Second Amendment, this Court noted that wherever the term "the people" is used throughout the Bill of Rights, that term denoted "persons," " 'people to whom [rights] are secured by our Constitution' " — and when "right of the people" is used, it denominates the rights of those persons against government.[4]

In addition, this Court's decision in *Verdugo-Urquidez* suggests the phrase "right of the people" must be construed in *pari materia* in the First, Second and Fourth Amendments.[5] Yet if that suggestion is combined with the Ninth Circuit panel's conclusion that the Second Amendment creates only a states' right, it necessarily follows that the

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[3] *See, e.g.*, U.S. CONST. art. I, § 1 ("legislative powers"); U.S. CONST. art. II, § 1 ("executive power"); U.S. CONST. art. III, § 1 ("judicial power"); Tenth Amendment ("powers not delegated to the United States").

[4] See discussion at 265-66 and quotation of a First Amendment case; and at 266 describing the purpose of the Fourth Amendment, which also employs the right of the people phraseology, as being "to protect the people of the United States against arbitrary action by their own Government . . ."

[5] 494 U.S. at 265. *Compare Freytag v. Commissioner*, 501 U.S. 868, 889, 115 L. Ed.2d 764, 786 (1991) (". . .the Constitution's terms are illuminated by their cognate provisions.") and *Patton v. U.S.*, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in *pari materia*.").

First Amendment "right of the people" to assemble applies only to assemblies of state officials. Likewise, the Fourth Amendment "right of the people" to be secure against unreasonable searches and seizures would apply only against federal searches of state-owned buildings.

Not to construe the phrase "right of the people" as used in the Second Amendment in *pari materia* would imply the following absurd conclusion: when Congress drafted the Bill of Rights, it used "right of the people" in the First Amendment to mean an individual right; but 16 words later, it used the same phrase in the Second Amendment to mean a right of the states; but, 46 words later, in the Fourth Amendment, it used that phrase to mean an individual right, as it did in the Ninth Amendment; and then, in the Tenth Amendment, it specifically distinguished "the states" from "the people."

In short, the Ninth Circuit panel's decision necessarily leads to the absurd conclusion that every time the phrase "right of the people" was used in the Constitution, it referred to the rights of individual citizens as against the government, except when that phrase was used in the Second Amendment.

Moreover the Ninth Circuit panel's rejection of the individual right concept is diametrically opposed to the vast majority of the scholarly research, including 40 or more post-1980 law review articles, 15 in major reviews.[6] In

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[6]David B. Kopel, "It Isn't About Duck Hunting: The British Origins of the Right to Arms", 93 MICH. L. REV. 1333 (1995); Glenn H. Reynolds & Don B. Kates, "The Second Amendment and States' Rights: A Thought Experiment", 36 WM. & M. L. R. 1737 (1995); Robert J. Cottrol and Raymond T. Diamond, " 'The Fifth Auxiliary Right' ", 104 YALE L. J. 995 (1994); William Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236 (1994); Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992); Don B. Kates, "The Second Amendment and the Ideology of Self-Protection" 9

contrast, endorsement of the states' right view is limited to a handful of articles by fervidly anti-gun authors, most being officers or paid employees of anti-gun groups, in mostly minor reviews.[7]

A further problem is that the "states' right" view contradicts the truism that the Bill of Rights does not create rights, but only guarantees pre-existing rights. From its "states' right" perspective, the panel understandably claims: "The Second Amendment creates a right. . . ." (emphasis added). However, that does not comport with the architec-

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CONSTITUTIONAL COMMENTARY 87 (1992); Robert J. Cottrol and Raymond T. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration", 80 GEORGETOWN L.J. 309 (1991); William A. Walker, Review, 88 MICH. L. REV. 1409 (1990); Akhil Reed Amar, "The Bill of Rights as a Constitution", 100 YALE L. J. 1131, 1164ff. (1990); Sanford Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637 (1989); F. Smith Fussner, Essay Review, 3 CONSTITUTIONAL COMMENTARY 582 (1986); Don B. Kates, "The Second Amendment: A Dialogue" in 49 LAW & CONTEMPORARY PROBLEMS 143 (1986); Robert Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986); Stephen Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986); Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH. L. REV. 203 (1983).

[7]Richard Aborn, "The Battle over the Brady Bill and the Future of Gun Control," 22 Fordham Urb. L.J. 417 (1995) (president of Handgun Control, Inc.); Carl Bogus, "Race, Riots and Guns", 66 U.S.C. L. REV. 1365 (1993) (by member of the board of the Center to Prevent Handgun Violence), Ehrman and Henigan, "The Second Amendment in the 20th Century: Have You Seen Your Militia Lately", 15 U. DAYTON L. REV. 5 (1989) and Henigan, "Arms, Anarchy and the Second Amendment", 26 VALPARAISO U. L. REV. 107 (1991) — both written by general counsel of Handgun Control, Inc.; Spannaus, State Firearms Regulation and the Second Amendment, 6 HAMLINE L. R. 383 (1983) (article by anti-gun politician); Fields, "Guns, Crime and the Negligent Gun Owner", 10 N. KY. L. R. 141 (1982) (article by non-lawyer lobbyist for the National Coalition to Ban Handguns).

ture of the Bill of Rights. As stated in an unchallenged passage of the dissent in *Verdugo-Urquidez* (494 U.S. at 288), "the Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing." Indeed, this truism was officially avowed by the First Congress in transmitting the Bill of Rights to the states for ratification.[8]

This Court has repeatedly recognized this truism in construing provisions of the Bill of Rights, including the Second Amendment, specifically, as well as the First Amendment. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 551-53 (right of assembly and right to arms are preexisting rights not created by the Bill of Rights). See also the language Justice Scalia quoted from a Second and Fourth Amendment case:

> "The law is perfectly well settled that the . . . Bill of Rights were not intended to lay down any novel principles of government, but simply to embody certain

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[8] Michael Kent Curtis, "The Curious History of Attempts to Suppress Antislavery Speech, Press and Petition in 1835-37, 89 NW. U. L. REV. 785, 794 (1995) (quoting Bill of Rights transmission document); see also Randy E. Barnett, "Foreword: Unenumerated Constitutional Rights and the Rule of Law", 14 HARV. J. L. & PUB. POLICY 615, 627, 629 (1991) (quoting First Congress debate), Malcolm, TO KEEP AND BEAR ARMS, above, pp. 145, 149 and fn. 72, Philip A. Hamburger, "Natural Rights, Natural Law, and American Constitutions," 102 YALE L. J. 907, 908, 915 (1993); Robert J. Cottrol and Raymond T. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration", 80 GEORGETOWN L.J. 309, 300 (1990); Suzanna Sherry, "The Founders' Unwritten Constitution," 54 U. CHI. L. REV. 1127, 1166, 1177 (1987); Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 HARV. L. REV. 149, 152-53 (1928) and citations there given.

guarantees and immunities which we had inherited from our English ancestors."[9]

In James Madison's notes presenting the Second Amendment to Congress, he indicated the Amendment was derived from the English Bill of Rights, which was phrased in purely individual terms: "the subjects which [sic] are Protestants may have arms for their defense . . . "[10] Madison emphasized the Amendment would guarantee the right to arms of all Americans, regardless of religion, and that it was binding on Congress, whereas the English right to arms applied only against the king, not Parliament.[11]

III

THE NINTH CIRCUIT PANEL'S DECISION CONTRADICTS THIS COURT'S PRIOR ANALYSES OF THE SECOND AMENDMENT

A. IN *UNITED STATES v. MILLER*, THIS COURT IMPLIEDLY RECOGNIZED A PERSONAL RIGHT IN THE SECOND AMENDMENT

The Ninth Circuit panel's opinion rests entirely upon a misinterpretation of this Court's decision in *United States v.*

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[9] *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1052 (1991, Scalia, J. concurring) (emphasis added) quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

[10] Don B. Kates, 82 MICH. L. REV. at 235-39.

[11] *Id.* at 237, fn. 144 (the English Bill of Rights stated only the rights of Englishmen against the king). These points were also emphasized in the first legal commentary on the Second Amendment, Justice St. George Tucker's 1803 edition of Blackstone with notes on American law. He annotates Blackstone's discussion of the right to arms in English law ("among the absolute rights of individuals") with the observation that in the United States this right has been constitutionalized, citing the Second Amendment. *Id.* at 251-42.

Miller, 307 U.S. 174 (1939), as well as upon a misunderstanding of the basic facts of *Miller*.

Oddly, the panel opinion lays great weight on what it calls "a famous passage" in *Miller* wherein this Court invoked the militia clause to define what kinds of arms the Second Amendment protects.[12] Odder yet, the panel fails to cite the case which this Court itself cited in support of this passage; namely, "*Aymette v. State*, 2 Humphreys (Tenn.) 154, 158."[13]

What is implicit in *Miller*, and explicit in *Aymette*, is that "every free white man may keep and bear arms" of the kind that form "part of the ordinary military equipment." Thus, "weapons which are usually employed in private broils and which are efficient only in the hands of the robber and assassin," such as "a spear concealed in a cane", "bowie knives", and "Arkansas tooth-picks" are not protected under the Second Amendment.[14]

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[12]The panel quotes the following from *Miller*, 307 U.S. at 178: "[i]n the absence of evidence tending to show that the possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

[13]307 U.S. at 178, citing *Aymette* whose Tennessee citation is 21 Tenn. 152. *Aymette* is reproduced (from the reporter in which the U.S. Supreme Court cited it) in vol. 1 of Robert J. Cottrol, GUN CONTROL AND THE CONSTITUTION (Garland, 1993) pp. 2-10. *Aymette* is discussed with its background and its progeny, in Reynolds, above, 61 TENN. U. L. REV. 647.

[14]*Aymette* discusses "free white men" because the right to arms provision of the Tennessee constitution was so limited. And it was limited to the right to possession of arms for "the common defense." Yet *Aymette* flatly recognized that the right was an individual one to possess arms, the limitations going only to the kind of arms, *i.e.*, that they be limited to those appropriate for defense. As to such arms, "The *citizens* have the ***unqualified right*** to ***keep*** the weapon . . . ." 2 Humph. at 160

In citing *Aymette* and adopting its standard, this Court recognized in *Miller* that an individual right to possess arms is guaranteed, limited only by the exclusion of "gangster" weapons such as sawed off shotguns, brass knuckles, garrotes, black jacks and "Saturday Night Specials."[15]

In addition, the panel failed to quote or heed Miller's equally famous discussion of who the militia are and who owns its arms:

> The signification attributed to the term "militia" appears from the debates in the Convention, the history and legislation of the colonies and the states, and the writings of approved commentators. These show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense . . . and further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Id. at 179.

(underlining Petitioner's, italics by the court). The quotations Petitioner has given in the text are from p. 158, the page cited by *Miller*, but the examples are taken from the kinds of arms prohibited by the Tennessee statute involved in *Aymette*, or from the opinion itself.

[15]Because Petitioner has quoted only the portion of *Miller* quoted by the panel, he has omitted the last sentence of the paragraph. It reads "Certainly it is not within judicial notice that this weapon [sawed off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense", and is followed by the citation to *Aymette*. The same phrase, "the ordinary military equipment" was used in *Aymette* to define the kinds of arms which are guaranteed to individuals.

For a discussion of the kinds of arms *Miller* implies are not protected by the Amendment, see Don B. Kates, 82 MICH. L. REV. at 260 (also suggesting further and additional principles limiting the kinds of arms the Amendment covers).

Thus, to harmonize the Amendment's militia clause with the "right of the people" phrase, requires no more than to recognize that the militia is the people and its arms are their arms. In guaranteeing the right to keep and bear arms to the people, the Amendment simply guarantees the arms of the militia — the people — against confiscation.

Were the panel's interpretation of *Miller* correct, *i.e.*, that respondent Jack Miller did not have standing under the Second Amendment, then this Court should have simply stated Jack Miller did not have standing to attack his indictment under the Second Amendment. Why was Jack Miller permitted to make a Second Amendment challenge, his claim being rejected only for lack of evidence that a sawed off shotgun was a militia-type weapon?

The answer cannot be that the *Miller* court was disinclined to dispose of substantive constitutional issues on standing grounds as the Ninth Circuit panel has done, for the *Miller* court had done so twice in that, and the preceding, Terms.[16]

Moreover, even if this Court had been disinclined to invoke standing, why did the *Miller* Court not simply resolve the substantive issue with a substantive decision to the effect that the Second Amendment did not protect Jack Miller's rights, but only those of states? Why did the *Miller* court go further and unnecessarily decide, instead, what standard applies to the kinds of firearm the Amendment protects?

The answer cannot be that the *Miller* Court was unacquainted with the states' right argument. The brief of the United States expressly urged that argument on the *Miller*

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[16] *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939) (electric power company has no standing to challenge TVA because it has "no legal right" to be free from competition), *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (same).

Court.[17] It was the individual right view which went unargued: Jack Miller had died and his side of the appeal went unbriefed.

It is also possible the panel's inconsistent conclusion was the result of a misunderstanding of the basic facts of *Miller*. Contrary to the panel's assertion, this Court in *Miller* did not uphold Jack Miller's conviction under the National Firearms Act, 26 U.S.C. Section 1132 (1932). In fact, the indictment against Mr. Miller was dismissed after the trial court ruled the National Firearms Act was contrary to the Second Amendment, and therefore unconstitutional, whereupon the U.S. attorney appealed the decision.[18] This factual misinterpretation may also explain the panel's statement that "no individual has ever succeeded in demonstrating such injury [to an interest protected by the Second Amendment] in federal court." In fact, Jack Miller succeeded in demonstrating such an injury at the trial level.

Petitioner respectfully submits the panel's reliance on *Miller* is not just baseless, but reaches a conclusion opposite to that which *Miller* implicitly embraced. The states/collective right theory was urged on this Court in *Miller*, but was not accepted. Ignoring the logically prior issue of whether there was a right, *Miller* focussed on what kind of firearm the right protects.

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[17] *United States v. Miller*, Brief of the United States [Summary of Argument]: "In both [England and the U.S.] the right to keep and bear arms has generally been restricted to the keeping and bearing of arms *by the people collectively* for their common defense and security. Indeed, the very language of the Second Amendment discloses that *this right has reference only to the keeping and bearing of arms by the people as members of the state militia* or other similar military organization provided for by law." Pp. 4-5 (emphasis added); see discussion in vol. 1 Robert J. Cottrol, GUN CONTROL AND THE CONSTITUTION, Introduction at xxvii (Garland, 1993).

[18] *Miller*, 307 U.S. at 176

The *Aymette* citation, and the passage defining the militia and its arms, make it clear the Amendment protects the right of individuals (from whom the militia must be drawn) to possess their private arms — which are the arms of the militia.

Finally, petitioner recognizes *Miller* can be read as just not addressing the issue of states' right versus individual right. Even so, such a reading still invalidates the Ninth Circuit panel's opinion because that opinion rests solely on construing *Miller* as adopting the state's right view. Since the panel's opinion is clearly based on a misinterpretation of *Miller*, the panel's opinion must fall of its own weight.

B. THIS COURT HAS ALSO IMPLIEDLY RECOGNIZED A PERSONAL RIGHT IN ITS LATER AND OTHER DISCUSSIONS REGARDING THE SECOND AMENDMENT

Footnote 5 of the Ninth Circuit panel's opinion asserts "The Supreme Court has not revisited the meaning of the Second Amendment except to cite *Miller*" in a footnote in a 1980 case.[19] This assertion is only true if the panel's "states' right" depiction of *Miller* is false. If *Miller* be deemed a states' right case, then this Court has twice revisited the issues in the 1990s without ever citing *Miller* — and in ways adverse to it. *Verdugo-Urquidez's* analysis indicates the Amendment secures a right to people (quoting a First

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[19]The panel cited *Lewis v. United States*, 445 U.S. 55, 65, n. 8 (1980) which, citing *Miller*, affirms that **felons and drug addicts** have no right to possess firearms (discussing federal laws barring them from doing so). Of course, this has no adverse implication for the right of law abiding, responsible adults to own firearms — any more than the exclusion of felons from the franchise implies that law abiding, responsible adults have no right to vote. It bears emphasis that many court of appeals opinions customarily cited as upholding the states' right view stand for nothing more than the exclusion of felons, without thereby impugning the individual right view of the Amendment.

Amendment case), a right that "protect[s] the people of the United States against arbitrary action by their own Government." *Verdugo- Urquidez*, 494 U.S. at 265 and 266 (referring to the Fourth Amendment after holding that it must be interpreted in *pari materia* with the First and Second).

Moreover, a 1992 opinion described the "full scope of liberty" guaranteed by the Constitution as including "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures".... *Planned Parenthood v. Casey*, 505 U.S. 833, 848, 120 L.Ed.2d 674, 696 (1992) (emphasis added), quoting earlier opinions. These 1990s opinions suggest an interpretation of the militia clause which conforms to that suggested by most scholars: As an amplification of the Amendment's purposes, not a limitation of its scope or meaning.[20]

In any event, the panel's denigration of the Second Amendment as a mere states' right, which has no relevance to private citizens, is wholly inconsistent with these 1990s opinions which analogized the Second Amendment to the First and Fourth Amendments.

Nor do these 1990s opinions stand alone. They are part of an almost 150-year tradition of opinions by this Court discussing the right to arms interchangeably with other personal right provisions of the Bill of Rights, and applying the same principles to them all. As an argumentum *ad horribilis*, Chief Justice Taney's opinion in Dred Scott

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[20] *I.e.*, the militia clause merely emphasizes the militia's composition from the individually armed citizenry as one of several reasons for guaranteeing individuals the right to arms. It does not thereby deny the other, and related, reasons: the individual right to arms as implicit in the cardinal right of self-defense (Locke, Montesquieu, Blackstone) from which right Locke derived his theory of the right of resistance to tyranny. 9 CONST. COMM. 89-97.

emphasized that if blacks could be citizens they would enjoy all the rights of citizens, including "the full liberty of speech . . . and to keep and carry arms wherever they went." *Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1858), Petitioner's emphasis; see also p. 450 for the observation: "Nor can Congress deny the people the right to keep and bear arms, the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding." To the same effect are *Cruikshank*, *supra*, 92 U.S. 542 (identical rule applied identically to right to arms and right to assemble), *Presser v. Illinois*, 116 U.S. 252 (1886) (same), *Miller v. Texas*, 153 U.S. 535, 538 (1894) (Second and Fourth Amendments), *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (Second Amendment and rest of Bill of Rights).

IV

THE "STATES' RIGHTS" ANALYSIS ADOPTED BY THE NINTH CIRCUIT PANEL WAS UNKNOWN TO THE FOUNDERS, AS IT WAS FOR A CENTURY THEREAFTER

The very concept that the right to arms is a "states' right" is a product of the modern gun control movement. The Founders were not even aware of any such concept; neither, as the opinions of this Court, just cited, exemplify, was any court or legal commentator for more than a century after the Amendment's enactment. An eminent constitutional scholar has recently quoted a preeminent historian of the Amendment as follows:

> "In recent years it has been suggested that the Second Amendment protects the "collective right" of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and rati-

> fied, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis."[21]

Consider how the Amendment was explained in a commentary which was before Congress when it voted on the Bill of Rights, and endorsed by Madison himself: "the people are confirmed by the next article in their right to keep and bear their private arms."[22] Anti-Federalist editorialists concurred, supporting the Amendment while accusing Madison of plagiarizing it from a proposal by their champion, Sam Adams, that "peaceable citizens" be guaranteed in the possession of "their own arms."[23]

Planned Parenthood and the other opinions by this Court, cited above, only follow the example of Madison and the other Founders in discussing the right to arms interchangeably with the freedoms of speech, religion and press, describing them all jointly as "human rights", "private rights", etc.[24]

The states' right concept was no less foreign to 19th Century analysts. They uniformly addressed the Amendment as an individual right, often in tandem with the First

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[21] Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. at n. 19, quoting Stephen Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT.

[22] "Remarks on the First Part of the Amendments to the Federal Constitution", PHILADELPHIA FEDERAL GAZETTE, June 18, 1789, p. 2, col. 1 (emphasis added), by Madison's fellow-Federalist, Tench Coxe, an article on which Madison later pronounced his imprimatur. 82 MICH. L. REV. at 223-25.

[23] *Id.*

[24] D. Kates, 82 MICH. L. REV. at 223-25 and 228-29.

and Fourth Amendments.[25] For instance, Mr. Justice Story's influential treatises described it as guaranteeing "The right of the citizens to keep and bear arms" and explained its purpose in terms the classically educated Founders took as an elementary historical truth: "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms."[26]

Moreover, in 1866, 1941 and 1986 Congress recognized "the rights of citizens — to keep and bear arms under the second amendment to the United States Constitution."[27]

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[25]See D. Kates, 82 MICH. L. REV. 244-247 (citing St. G. Tucker [1803] and Rawle [1825]); Sanford Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637, 649-50 (1989) (citing Story [1833]; Cooley [1898] and Shroeder [1904]); Halbrook, *supra* at 101-04 (citing Spooner [1845] and Tiffany [1849]); Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment", 101 YALE L. J. 57, 84, (1993) (Citing Farrar [1867]); Don B. Kates, "The Second Amendment and the Ideology of Self-Protection" 9 CONSTITUTIONAL COMMENTARY 87, n. 1 (1992) (citing Pomeroy [1868], von Holst [1885], Schouler [1897], J. Tucker [1899], Putney [1908] and Black [1910]).

[26]Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1890 (1833) (emphasis added) and A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1834). Compare Aristotle's comment that free governments glory in arming their citizens while oligarchies and tyrants "mistrust the people and therefore deprive them of their arms." — POLITICS 218 (J. Sinclair trans., 1962). See Aristotle's discussions of how the confiscation of the Athenians' personal arms had led to the tyrannies of the Pisistratids and the Thirty. (Cited at 82 MICH. L. REV. 231-33 along with other philosophers who taught the Founders that only armed citizens could preserve their liberties — Plato, Cicero, Machiavelli, Thomas More, Hobbes, Harrington, Locke, Trenchard, Montesquieu, Blackstone and Rousseau.)

[27]Quoting Firearms Owners' Protective Act § (b), 100 Stat. 449 codified at 18 U.S.C. § 921 *et seq.* For further details on this and

Nor was this merely a bare finding, unsupported by evidence. Unlike the Ninth Circuit panel opinion, or the opinions of other courts of appeals cited therein, Congress' 1986 finding is informed by a detailed Senate Judiciary Committee Report covering the historical and philosophical background, as well as the legal precedents and legal commentary.[28] Petitioner respectfully submits this Report is another, and separate, authority impugning the panel's conclusions.

But even if no weight need be attached to the Report, findings of Congress which imply or involve interpretation or pronouncement as to constitutional meaning carry at least as much weight as do the opinions of the courts of appeal. Congressional interpretations of a constitutional provision do not bind this Court (and this is especially true of narrow interpretations of the Bill of Rights[29]). But congressional interpretation is "persuasive" and "entitled to great consideration."[30]

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preceding Congressional interpretations see Stephen P. Halbrook, "Congress Interprets the Second Amendment: Declarations by A Co-Equal Branch on the Individual Right to Keep and Bear Arms," 62 TENN. L. REV. 597 (1995).

[28] 97th Congress, 2d Session: REPORT OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE OF THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS (Committee Print 1982).

[29] *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989) (though deference is due to Congressional findings, particularly when they support the constitutionality of a challenged enactment they cannot supersede the Court's duty to vindicate First Amendment rights).

[30] *Veazie Bank v. Fenno*, 75 U.S. 533, 544 (1869), *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("great respect"), *Franklin v. Massachusetts*, 505 U.S. 788, 803-04, 120 L. Ed. 2d at 652 (1992) ("persuasive"), *Ray v. Blair*, 343 U.S. 214 (1952), *Murray's Lessee v. Hoboken Land & Improvement*, 59 U.S. 272, 277 (1865) and authority there cited.

V

CONCLUSION

Perhaps the most important point is that offered in defense of the Warren Court's criminal justice decisions by its most conservative justice: It is essential for the people to see that judges do not just pick and choose among the Bill of Rights according to their personal preferences, but rather that judges preserve the document as a whole. If the privilege against self-incrimination (or the right to arms) is to be removed from the Bill of Rights, it must be done by formal amendment as specified in the Constitution, not by judges acting as policy-makers. *Ullman v. U.S.*, 350 U.S. 422, 427-428 (1956) (per Frankfurter, J.).

That is the magnitude of the issue involved here. There is no way to square the Ninth Circuit panel's view with Mr. Justice Story's explanation that the Amendment reflects the Founders' deep concern to preclude "One of the ordinary modes, by which tyrants accomplish their purpose without resistance [which] is, by disarming the people and making it an offense to keep arms." A FAMILIAR EXPOSITION OF THE CONSTITUTION 264 (1834) (emphasis added).

For the foregoing reasons, it is respectfully requested that this Court grant this Petition for Writ of Certiorari and finally resolve the increasingly divisive and contentious issue of whether individuals have standing under the Second Amendment to enforce the right to keep and bear arms.

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In propria persona

APPENDIX

No. 94-55836.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 13, 1995.

Decided April 5, 1996.

DOUGLAS RAY HICKMAN,
Plaintiff-Appellant,

v.

SHERMAN BLOCK; CLAUDE L. FARRIS; PATRICK G. LEONARD; CITY OF LOS ANGELES; DARRYL GATES, POLICE CHIEF; ROBERT TALCOTT; HERBERT BOEKMANN; REVA B. TOOLEY; SAMUEL L. WILLIAMS; STEPHEN D. YSLAS; WILLIAM COWDIN; FRANK E. PIERSOL; DOMINICK J. RIVETTI; CITY OF SAN FERNANDO; COUNTY OF LOS ANGELES,
Defendats-Appellees.

Plaintiff sued cities, county, and officials following denial of his applications for concealed firearms permit. The United States District Court for the Central District of California, Robert M. Takasugi, J., granted summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that Second Amendment right to bear arms is a right held by states and does not protect possession of weapon by a private citizen, and thus plaintiff lacked standing to sue.

Affirmed.

1. Weapons — 1

Second Amendment's right to bear arms is a right held by states, and does not protect possession of weapon by private citizen. U.S.C.A. Const.Amend. 2.

2. Federal Courts — 12.1

Existence of a case or controversy is a jurisdictional prerequisite. U.S.C.A. Const. Art 3, § 2, cl. 1.

3. Federal Civil Procedure — 103.2

Party invoking federal jurisdiction has burden to establish his standing to sue.

4. Federal Civil Procedure — 103.2, 103.3

For plaintiff to have standing to sue, plaintiff must have suffered injury to a legally protected interest that is both concrete and particularized, there must be a causal connection between injury and conduct complained of, and injury must be redressable by a favorable judicial decision; injury must be both concrete and particularized, and actual or imminent rather than conjectural or hypothetical.

5. Constitution Law — 42.3(1)

States alone stand in the position to show legal injury when right to bear arms is infringed, and thus only states have standing to sue. U.S.C.A. Const.Amend. 2.

6. Constitutional Law — 72

Decisions as to composition, training, equipping, and control of a military force are essentially professional military judgments, and as such are nonjusticiable.

Richard J. Hopkins, Law Office of Richard Hopkins, Simi Valley, California, for plaintiff-appellant.

Randel L. Ledesma, Greines, Martin, Stein & Richland, Beverly Hills, California, for defendants-appellees County of Los Angeles, and Sherman Block.

Donna Weisz Jones, Deputy City Attorney, Los Angeles, California, for defendant-appellee City of Los Angeles.

Kevin H. Louth, Arthur G. Lesmez, and Joseph Zamora, Liebman, Reiner, Nashison & Walsh, Los Angeles, California, for defendants-appellees City of San Fernando and Rivetti.

Don B. Kates, Benenson & Kates, Novato, California, for amici.

Appeal from the United States District Court for the Central District of California Robert M. Takasugi, District Judge, Presiding, No. CV-91-05594-RMT(Bx).

Before: HALL and NOONAN, Circuit Judges, and SHUBB,* District Judge.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Douglas Ray Hickman appeals from an order granting summary judgment in favor of the appellees, who denied Hickman a concealed weapons permit. He complains, among other things, that the appellees' permit issuance policy violated his Second Amendment right to bear arms. We have jurisdiction over his timely appeal pursuant to 28 U.S.C. section 1291, and affirm on the basis that Hickman lacks standing to sue for a violation of the Second Amendment.

I

Hickman owns and operates a responding security alarm company.[1] He is also a federally licensed dealer. Wishing to break into the lucrative filed of "executive protection," Hickman submitted a string of applications for a concealed firearms permit to the appellee municipal authorities. When the authorities denied Hickman's applications, he filed this

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* Hon. William B. Shubb, United States District Judge for the Eastern District of California, sitting by designation.

[1]Under California law, this entitles Hickman to carry an exposed firearm while he is in uniform. *See* Cal.Penal Code § 12031(d).

suit for damages and injunctive relief, arguing several theories of liability under 42 U.S.C. sections 1983 and 1985(3). We considered and rejected in a unpublished memorandum disposition all of Hickman's various arguments save one: his claim for relief under section 1983 based on a violation of the Second Amendment. This issue we now address. Only appellees County of Los Angeles, City of San Fernando, and their named officials remain as parties to the action.

The appellees issued concealed firearms permits under the authority of a California statute which provides, in relevant part:

> The sheriff of a county or the chief or other head of a municipal police department of any city or city and county; upon proof that the person applying is of good moral character, that *good cause* exists for the issuance, and that the person applying is a resident of the county, may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person . . .

Cal.Penal Code § 12050(a)(1) (emphasis added). The County and San Fernando share in common a policy concerning the requirements of "good cause." Under the policy, good cause is shown by

> convincing evidence of a clear and present danger to life . . . which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.

The policy also requires some proof of firearms training. Finally, the policy provides that "[n]o position or job classification in itself should constitute good cause for the issuance or denial of a license." Each application is to be reviewed individually for cause.

Hickman first applied for a permit in 1988. He applied to each of the appellees in turn, stating that he required a permit in order to work as a private bodyguard. The County and San Fernando denied his applications on the grounds that Hickman, having cited no "clear and present danger" to personal safety, had failed to show good cause. Hickman next attempted to obtain a permit in 1989 by joining a reserves unit for the San Fernando police department.[2] For reasons not clear in the record, San Fernando denied him admission to the reserves and blocked this approach to a permit.[3]

Hickman submitted his final round of permit applications in 1991, following two incidents which, he felt, amounted to a showing of good cause. First, Hickman reported being "approached" by two "Hispanic men" while he loaded ammunition into his car. He frightened them away by raising an unloaded pistol. Second, Hickman recited an isolated threat by a disgruntled ex-employee, who allegedly said: "I know where you live;" "You will have to look over your shoulder for the rest of your life;" and "I will get you and it won't even be me." On the force of these incidents Hickman reapplied to the County and San Fernando. The County denied Hickman's application for failure to show cause and San Fernando apparently failed to respond.

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[2]At oral argument, Hickman's attorney denied that his client had attempted to join the reserves to obtain a permit. However, in his 1991 permit re-application to the County. Hickman stated that his "ulterior motive" for applying to the reserves had been to obtain a permit. Police officers obtain their concealed weapons authorization under a separate statute, which does not demand a showing of good cause. *See* Cal.Penal Code § 12031(b). Hickman does not attack the preferential access of police officers to concealed weapons permits in this lawsuit.

[3]According to Hickman, the San Fernando Police cited a potential conflict of interest between Hickman's private security operation and his official duties. San Fernando maintains that it rejected Hickman's application after uncovering his ulterior motive.

Hickman next went to court; he filed this lawsuit in October 1991. In March 1992 the district court granted the County's motion to dismiss Hickman's action to the extent that it was based upon a violation of the Second Amendment. It also denied his section 1985(3) conspiracy claim. The City of Los Angeles, having been a party only to the conspiracy claim, was then dismissed as a party to the suit. In July 1992 the County moved for summary judgment on the remaining claims. Discovery ensued. San Fernando joined in the County's motion. In May 1994 the district court entered its final order granting summary judgment for the remaining appellees: the County, San Fernando and their respective municipal officers.

II

[1] The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Hickman argues that the Second Amendment requires the states to regulate gun ownership and use in a "reasonable" manner. The question presented at the threshold of Hickman's appeal is whether the Second Amendment confers upon individual citizens standing to enforce the right to keep and bear arms. We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen. We conclude that Hickman can show no legal injury, and therefor lacks standing to bring this action.

[2] Article III of the Constitution restricts the federal courts to adjudicating actual "cases" or "controversies." This limitation "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Among

the cluster of doctrines that ensure our adherence to the case-or-controversy requirement, the "doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important." *Id.* Article III standing is a jurisdictional prerequisite, *See id.* at 754, 104 S.Ct. at 3326. Thus, we are bound to address the standing issue at the threshold of the case.

[3, 4] The party invoking federal jurisdiction has the burden to establish his standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). To do so, a litigant must satisfy three elements which constitute the "irreducible constitutional minimum" of Article III standing. *Id.* First, the plaintiff must have suffered injury to a legally protected interest. *Id.* This injury must be both "concrete and particularized," *id.* (citing *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41, 92 S.Ct. 1361, 1368-69, 31 L.Ed.2d 636 (1972)), and "actual or imminent" rather than "conjectural or hypothetical." *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)) (internal quotations omitted)). Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976)). Third, the injury must be redressable by a favorable judicial decision. *Id.* (citing *Simon*, 426 U.S. at 38, 96 S.Ct. at 1924).[4]

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[4] In addition to its constitutional components, standing doctrine also includes several "judicially self-imposed" constituents, grounded in comity and prudence. *Wright*, 468 U.S. at 751, 104 S.Ct. at 3324. We need not address these elements here, however.

This case turns on the first constitutional standing element: whether Hickman has shown injury to an interest protected by the Second Amendment. We note at the outset that no individual has ever succeeded in demonstrating such injury in federal court. The seminal authority in this area continues to be *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), in which the Supreme Court upheld a conviction under the National Firearms Act, 26 U.S.C. § 1132 (1934), for transporting a sawed-off shotgun in interstate commerce. The Court rejected the appellant's hypothesis that the Second Amendment protected his possession of that weapon. Consulting the text and history of the amendment, the Court found that the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia. In a famous passage, the Court held that

> [i]n the absence of any evidence tending to show that the possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

307 U.S. at 178, 59 S.Ct. at 818.[5] The Court's understanding follows a plain reading of the Amendment's text. The Amendment's second clause declares that the goal is to preserve the security of "a free state;" its first clause establishes the premise that a "well-regulated militia" is necessary to this end. Thus it is only in furtherance of state

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[5]The Supreme Court has not revisited the meaning of the Second Amendment except to cite *Miller* for the proposition that federal restrictions on the use of firearms by individuals do not "trench upon any constitutionally protected liberties." *Lewis v. United States*, 445 U.S. 55, 65 n. 8, 100 S.Ct. 915, 921 n. 8, 63 L.Ed.2d 198 (1980) (upholding 18 U.S.C. App. § 1202(a)(1)).

security that "the right of the people to keep and bear arms" is finally proclaimed.[6]

[5] Following *Miller*, "[i]t is clear that the Second Amendment guarantees a collective rather than an individual right." *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied* 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976); *see also Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir.1984) (same, citing *Warin*); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir.1974) (cited with approval in *Lewis*, 445 U.S. at 65 n. 8, 100 S.Ct. at 921 n. 8) (same). Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed.

Nevertheless, Hickman argues that under the Second Amendment, individuals have the right to complain about the manner in which a state arms its citizens. We fail to see the logic in this argument. The Second Amendment creates a right, not a duty. It does not oblige the states to keep armed militia,[7] or to arm their citizens generally, although some states do preserve, nominally at least, a broad individ-

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[6] The Constitution provided for armed militia because "[t]he sentiment of the time strongly disfavored standing armies. . . ." *Miller*, 307 U.S. at 179, 59 S.Ct. at 818. Under the resultant constitutional scheme. Congress had power to raise an army if circumstances required, however "the common view was that adequate defense of country and laws could be secured through the Militia — civilians primarily, soldiers on occasion." *Id.; see also Perpich v. Dept. of Defense*, 496 U.S. 334, 340, 110 S.Ct. 2418, 2422-23, 110 L.Ed.2d 312 (1990) (discussing constitutional compromise of state sovereignty, individual liberty and necessity of common defense which resulted in provision for both a national army and state militia).

[7] Although *Congress* may do so. *See* U.S. Const. art. I, § 8, cls. 15-16 (Militia Clauses); *Miller*, 307 U.S. at 178, 59 S.Ct. at 818 (discussing division of power over the militia between Congress and the states); *Perpich*, 496 U.S. at 340, 110 S.Ct. at 2422-23 (same); *Select Draft Law*

ual right to bear arms as a foundation for their state militia.[8] *See, e.g., People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975) (en banc) (citing Colo. Const. art. II, § 13) (recognizing individual right to bear arms under state constitution); *State v. Amos*, 343 So.2d 166, 168 (La.1977) (citing La. Const. art I, § 11) (same proposition); *State v. Krantz*, 24 Wash.2d 350, 164 P.2d 453 (1945) (citing Wash. Const. art I, § 24) (same proposition); *Akron v. Williams*, 113 Ohio App. 293, 177 N.E.2d 802 (1960) (citing Ohio Const. art. I, § 4) (same proposition). Even in states which profess to maintain a citizen militia, an individual may not rely on this fact to manipulate the Constitution's legal injury requirement by arguing that a particular weapon of his admits some military use, or that he himself is a member of the armed citizenry

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Cases, 245 U.S. 366, 383, 38 S.Ct. 159, 163, 62 L.Ed. 349 (1918) (same).

[8] Originally, in the American Colonies of the 17th Century, "as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defense." *Miller*, 307 U.S. at 179-80, 59 S.Ct. at 818. To ensure the readiness of their militias, the colonies enacted laws "intended to assure the possession of arms and ammunition by all who would be subject to military service." *Id.* at 180, 59 S.Ct. at 818-19. The Second Amendment preserved the right of the new American states to continue this practice.

Likewise, in the early days of the Republic, Congress passed a statute to establish "an Uniform Militia throughout the United States" by requiring universal self-armament for men of appropriate age. *Perpich*, 496 U.S. at 341, 110 S.Ct. at 2423 (discussing 1 Stat. 271). In practice the command was ignored, and so in 1901 President Theodore Roosevelt and the Congress embarked on the establishment of the modern National Guard system. *Id.* at 341-43, 110 S.Ct. at 2423-24.

Today, federal law continues to assure that "in addition to its National Guard, a State may provide and maintain at its own expense a defense force that is exempt from being drafted into the Armed Forces of the United States." *Id.* at 352, 110 S.Ct. at 2429 (citing 32 U.S.C. § 109(c) (1990)).

from which the state draws its militia. *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir.1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978) (technical membership in state militia insufficient to show legal injury under Second Amendment); *Warin*, 530 F.2d at 106 (same with respect to individual "subject to enrollment" in state militia); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) (same, citing *Warin*); *United States v. Graves*, 554 F.2d 65, 66 n. 2 (3rd Cir. 1977) (en banc) (narrowly construing the Second Amendment "to guarantee the right to bear arms as a member of a militia").

[6] Hickman's claim amounts to a "generalized grievance" regarding the organization and training of a state militia. *See Lujan*, 504 U.S. at 575, 112 S.Ct. at 2144. We do not involve ourselves in such matters. As the Supreme Court has observed, "decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," and as such are nonjusticiable. *Gilligan*, 413 U.S. at 10, 93 S.Ct. at 2446. "[I]t is difficult to conceive of an area of governmental activity in which the court have less competence." *Id.* For this reason, among others, we leave military matters to the elected branches of government.[9] *See id.*

III

Because the right to keep an armed militia is a right held by the states alone, Hickman has failed to show "injury" as

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[9]For similar reasons we do not involve ourselves in nonjusticiable areas of social policy. Amici argued at length that widely diffused gun ownership is good social policy. We are in no position to accept or reject this claim.

required by constitutional standing doctrine. Accordingly we have no jurisdiction to hear his appeal.[10]

The judgment is AFFIRMED.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 12050. Issuance of licenses; qualifications of licensee; restrictions, conditions, prohibitions, revocations; amendments to licenses; changes in addresses; renewals

(a)(1) The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to that person a license to carry a pistol, revolver, or other

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[10]Moreover, even if we determined that Hickman had standing to sue for violation of the Second Amendment, his suit would nevertheless fail because the Second Amendment is not incorporated against the states. *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

firearm capable of being concealed upon the person in either one of the following formats:

(A) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(B) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) A license issued pursuant to this section is valid for any period of time not to exceed one year from the date of the license, or in the case of a peace officer appointed pursuant to Section 830.6, three years from the date of the license.